WONG THIAM PHIN v. LABUAN FERRY CORPORATION SDN BHD

HIGH COURT SABAH & SARAWAK, LABUAN
STEPHEN CHUNG J
[CIVIL SUIT NO: LBN-22-7-4-2013]
19 JUNE 2015

CIVIL PROCEDURE: *Amendment – Statement of claim – Procedure and standard practice of making amendments – Whether complied with – Whether amendment would cause injustice and prejudice to other party – Whether application bona fide – Whether prejudice caused to other party could be compensated by costs – Whether amendments would turn suit from one character into another suit of inconsistent character – Rules of Court 2012, O. 20 r. 10*

The plaintiff filed the present application to amend his statement of claim ('SOC') against the defendant. The plaintiff claimed against the defendant for losses suffered due to excessive ferry charges by the latter. The plaintiff also submitted that he was victimised by the defendant's wrongful refusal to sell ferry tickets to the former which in turn resulted in his transportation contracts being terminated by his customers. It was the plaintiff's further submission that the proposed amended SOC was still for damages for breach of contract and the amendments sought were based on existing facts that were substantially the same as in the original claim. Therefore, the suit would not change into one of a different character. In objecting to the application, the defendant argued that the plaintiff's affidavit in support lacked sufficient material evidence to support the reasons for making this application. The defendant further argued that the application to amend was delayed and an afterthought as it was made to strengthen the plaintiff's claim due to the outcome of a hearing at the Court of Appeal. The plaintiff denied the defendant's averments and submitted that there was no delay and the application was made *bona fide*.

Held (allowing application):

(1) Order 20 r. 10 of the Rules of Court 2012 ('ROC') deals with how to effect an amendment. Where there are numerous amendments, the practice is to prepare a proper application setting out the amendments proposed to be made, to be clearly identified by being underlined in colour. In practice, the proposed amendments are underlined in red ink and subsequent re-amendments will be underlined in a different colour or ink, usually in green. During the hearing for the amendments, there was no application for direction for the proposed amendments to be underlined. (paras 18 & 22)

(2) Apart from the additions of new words, phrases or sentences in the plaintiff's proposed amendments, there have been deletions of words, phrases or sentences. There was also deletion of some paragraphs which were substituted with new paragraphs and insertions of new paragraphs and particulars. The plaintiff did not underline the proposed amendments which is required. It is the standard practice. (paras 16 & 22)

(3) The proposed amendments, except where they were not allowed, should be allowed as they enable the real questions in controversy between the parties to be determined at the trial. The proposed amendments arose from the same facts which were previously pleaded and was made *bona fide*. Even if a paragraph was not pleaded, parties could still submit on a point of law based on the existing facts pleaded and no prejudices would be caused to the defendant. However, paragraphs containing new allegations were not *bona fide* and should not be allowed. (paras 25, 26, 27 & 30)

Case(s) referred to:
ASM Development Sdn Bhd v. Hijjas Kasturi Associates Sdn Bhd [2009] 3 CLJ 1 CA ***(refd)***
Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [1998] 2 CLJ 11 CA ***(refd)***
Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2010] 8 CLJ 1 CA ***(refd)***
Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
HA Securities Sdn Bhd v. Ng Kong Yeam [1993] 4 CLJ 433 HC ***(refd)***
Hj Hassan & Ors v. Teo Soon Yen & Anor [1962] 1 LNS 51 HC ***(refd)***
Khoo Tau Guan v. Weng Lai Ping & Ors [2004] 5 CLJ 249 HC ***(refd)***
Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd [1995] 1 LNS 118 HC ***(refd)***
Re Langton (decd), Langton v. Lloyds Bank Ltd [1960] 1 WLR 246 ***(dist)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 20 r. 10(1), (2)
Rules of the High Court 1980, O. 14A, O. 33 r. 5

Other source(s) referred to:
Malaysian Civil Procedure 2013, para. 20/10/1
Supreme Court Practice, 1997, vol 1, para. 20/10/2

For the plaintiff - A Kailesh Arumugam; M/s Kailesh Aru & Co
For the defendant - PK Lim; M/s CL Teh & Lim

Reported by Najib Tamby

JUDGMENT

Stephen Chung J:

[1] This is an application that the plaintiff be given leave to amend the statement of claim dated 25 March 2013 as shown in the draft annexed to the notice of application and marked 'amended' in red ink and that the costs of the application be costs in the cause.

[2] The plaintiff submitted that the facts set out in the proposed amended statement of claim are now more clearly clarified and the issues to be determined by the court are also more clearly laid out. It was contended that the crux of the plaintiff's claim is that due to the abuse of the defendant's monopolistic position, the plaintiff had suffered severe losses by having to pay excessive ferry charges and victimised by the defendant's wrongful refusal to sell ferry tickets to the plaintiff which in turn resulted in his transportation contracts being terminated by his customers.

[3] The plaintiff submitted that the plaintiff's claim in the proposed amended statement of claim is still for damages for breach of contract and tort and the amendments sought are based on the existing facts that were substantially the same as in the original claim. Therefore it was submitted that the proposed amendments would not change the suit into one of a different character, referring to the authorities of *ASM Development Sdn Bhd v. Hijjas Kasturi Associates Sdn Bhd* [2009] 3 CLJ 1; *Khoo Tau Guan v. Weng Lai Ping & Ors* [2004] 5 CLJ 249.

[4] It was submitted that there is no need to underline the whole pleading in red ink wherever the amendments are made especially when the amendments are numerous. The plaintiff's solicitors have relied on counsel's advice and longstanding practice including as stated by a Queen's Counsel in London, that only the title must be marked so as to show that the pleading is an amended statement of claim. It was submitted that if deemed fit, the court can give directions that the amendments be underlined.

[5] The plaintiff submitted there was no delay in making this application and that an application for amendment can be made at any stage of the proceedings. It was submitted that no delay was caused by the amendments because the case has yet to proceed to trial and no pre-trial directions have been given, citing the case of *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2010] 8 CLJ 1.

[6] It was submitted that the application was made *bona fide*, that the defendant is not prejudiced in any way which cannot be compensated by costs and the defendant has failed to show that it has been prejudiced by the proposed amendments.

[7] In reply, the defendant submitted that the plaintiff's affidavit in support lacked sufficient material evidence to support the reasons for making this application, that the plaintiff ought to provide full details and cannot take the "exhibited proposed amendment" as the sole basis for making this application, citing the authority of *HA Securities Sdn Bhd v. Ng Kong Yeam* [1993] 4 CLJ 433; [1993] 3 MLJ 489. It was submitted that since no evidence was led on the part of the pleadings to be amended or deleted and they are therefore of no consequence to the court. In that suit, the plaintiff applied to amend the pleadings in the middle of the trial and the application was refused because no evidence was laid before the court during the trial to support that application.

[8] In this instant case, the trial has not commenced. In their pleadings the parties are merely required to set out the material facts in support of their claims. It is sufficient to plead the material facts without setting out the evidence sustaining the allegations or pleadings. At the pleading stage, it is not necessary to plead evidence or adduce any evidence in support of the pleadings. This should be adduced at the trial: see *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74.

[9] The defendant submitted that the plaintiff previously did not raise the issue of monopolistic position in the pleadings. It submitted that it was first raised by the plaintiff in the Court of Appeal and this issue was not a fact in issue at the High Court. It submitted that this application to amend to strengthen the plaintiff's claim was the outcome of the hearing at the Court of Appeal. It submitted that there are numerous amendments including new pleadings on the monopolistic position and the category of vehicle used which have changed the suit to one of a different character.

[10] It submitted that this application is an afterthought, a tactical manoeuvre, in bad faith and that the court should not allow the plaintiff to have a second opportunity to improve its case against the defendant, citing *Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd* [1995] 1 LNS 118; [1995] 4 MLJ 616; *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [1998] 2 CLJ 11; [1998] 2 MLJ 301; *Haji Hassan & Ors v. Teo Soon Yen & Anor* [1962] 1 LNS 51; [1971] 2 MLJ 197.

[11] The defendant submitted that the plaintiff has delayed in making this application. It submitted that the plaintiff has filed two suits in 2013 against the defendant ie, this suit and Suit LBN-22-15-6-2013. It submitted that Suit LBN-22-15-6-2013 raised the monopolistic position of the defendant and that it was abundantly apparent long ago that the plaintiff should have made the amendments then but failed and has delayed in doing so. It submitted that it has been prejudiced and that the application be dismissed with costs.

[12] Based on court records, the plaintiff and others filed two suits ie, Suit 22-7-4-2013 and Suit 22-15-6-2013 against the defendant. The defendant had filed a defence in each suit. The first plaintiff applied to withdraw as the first plaintiff in Suit 22-15-6-2013 but remained as the plaintiff in 22-7-4-2013. In December 2013, in each of the suits, the defendant filed an application under O. 33 r. 5 of the Rules of the High Court that the suit be dismissed on point of law. On 7 April 2014 the presiding judge allowed the applications and dismissed the plaintiffs' suits. On appeal, on 16 October 2014, the Court of Appeal allowed the appeals, set aside the orders of the High Court and both cases were remitted back to the High Court to be heard before another High Court Judge on the ground that the defendant did not set out the questions on point of law to be decided by the court. It was directed that the defendant was at liberty to file another application under O. 33/O. 14A with proper questions framed for determination as the case may be.

[13] These two suits came before me on 8 January 2015 for case management. Counsel for the plaintiffs advised that they intended to file an application to amend the statement of claim in each suit whereas counsel for the defendant was absent because he did not receive notice of the hearing. On 22 January 2015, counsel for the defendant applied for leave to withdraw the two applications under O. 33 and would file a new application under O. 33 in both suits. In March 2015, the plaintiffs filed their application for amendments and the defendant filed two applications under O. 33.

[14] In an application to amend a statement of claim after the close of pleadings, the general principle is that the court will allow such amendment as will cause no injustice to the other parties. Three basic questions should be considered (a) whether the application was *bona fide*, (b) whether the prejudice caused to the other side can be compensated by costs, and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character: *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213.

[15] In prayer 1 of this application, the plaintiff prayed that he be given leave to amend the statement of claim dated 25 March 2013 as shown in the draft annexed hereto and marked 'amended' in red ink. Reading the proposed 'amended statement of claim', the only proposed amendment in red ink is the word "amended". There is no any other proposed amendment underlined in red ink. It seems that that is the only proposed amendment to be made in this application and can be misleading.

[16] In fact, there are numerous and extensive amendments to be made to the statement of claim. Apart from the additions of new words or new phrases or new sentences in the proposed amendments, there have been deletions of words or phrases or sentences and deletion of some paragraphs which are substituted with new paragraphs. The plaintiff has also inserted new paragraphs and particulars in the proposed amendments. These additions, deletions and insertions of new paragraphs have not been underlined in red ink. The plaintiff submitted that there is no need for a sea of red ink, referring to the English Practice Direction 17, para. 20/10/2 of the *Supreme Court Practice, 1997*, Vol. 1 and the case of *Re Langton (decd), Langton v. Lloyds Bank Ltd* [1960] 1 WLR 246.

[17] The English Practice Direction does not apply in this country although it serves as a guideline or reference. Paragraph 20/10/2 of the *Supreme Court Practice* states that whenever an amendment is made under this order (O. 20 r. 10(2)) whether with or without leave, such amendments must be made prescribed by para. (2) of this rule. A party appears to be entitled to amend his pleadings once without leave in any colour ink he chooses but where leave is required to amend, the court may impose a term that such amendments be made in different colour inks in accordance with the practice in the Practice Direction.

[18] Order 20 r. 10(1) of the Rules of Court 2012 is similar to the English O. 20 r. 10. This rule deals with how to effect an amendment. If the amendments are minor, they may be handwritten by the presiding judge or Registrar onto the documents filed in court. This course of conduct is, in practice, rarely followed except to rectify typographical errors noticed during the course of proceedings, which are amended without objections: see para. 20/10/1 *Malaysian Civil Procedure 2013*. In all other cases, where there are numerous amendments, the practice is to prepare a proper application setting out the amendments proposed to be made, to be clearly identified by being underlined in colour. In practice, the proposed amendments are underlined in red ink. Subsequent reamendments will be underlined in a different colour or ink, usually in green ink.

[19] In the case of *Langton v. Lloyds Bank*, the plaintiff in that case appeared in person, without counsel, and delivered an amended, and subsequently a re-amended statement of claim, the amendments being made in black. There was no objection by the defendants that the amendments should be in red ink or not proper. However, the Registrar, on his own motion, while hearing an application for discovery which he refused, told the plaintiff to put his amendments in coloured ink but he refused. The Registrar then ordered him to put in the amendments within 28 days but the plaintiff failed to do so. Subsequently the fourth defendant took out a summons to dismiss the action for want of prosecution. The Registrar dismissed the action on the ground that the plaintiff refused to deliver the amended statement. On appeal to the judge, it was dismissed. The plaintiff appealed to the Court of Appeal which allowed the appeal because the ground for dismissal was wrong and that there was no objection to the amendments.

[20] *Langton*'s case can be distinguished based on the facts and circumstances in that case which were different from the facts and circumstances in this case. The plaintiff at all material times was and is represented by counsel and there are strong objections to the application for the amendments.

[21] On a cursory reading of the proposed amended statement of claim, the court, and for that matter the other side, will not know or not be able to identify what are the proposed amendments to be made and whether to be allowed or otherwise. It took some time by comparing the original and the proposed amendments to determine which words or phrases or sentences have been deleted or added or changed to a different word or a different meaning. Similarly, in respect of paragraphs which are being deleted and substituted by new paragraphs and the additions of new paragraphs which have not been identified as having been deleted or substituted or amended. Since there are numerous proposed amendments, it is difficult and inconvenient to read and determine what are the proposed amendments, whether they complied with the rules and whether to allow the amendments or otherwise.

[22] This is the application of the plaintiff to amend. The plaintiff did not underline the proposed amendments which is required. It is the standard practice. There was no explanation why it could not be done since it has been submitted that it was to clarify the pleadings and the issues for trial. During the hearing for the amendments, there was no application for direction for the proposed amendments to be underlined so that there is no confusion. Then, on 19 May 2015, counsel for the plaintiff tendered a new proposed amended statement of claim which actually deleted end paragraph in the original statement of claim and substituted with new paragraphs. This is different from the previous proposed amended statement of claim.

[23] It is the duty of the plaintiff to ensure that the application complies with the rules or practice governing court procedures and that the application does not cause any inconvenience or confusion. Where the application is not set out clearly or leads to or tends to lead to confusion or arguments about the extent of the proposed amendments, the application may be dismissed.

[24] As stated in my ruling in Suit 22-15-6-2013, the crux of the proposed amendments alleged that the defendant being the sole provider of the ferry services between the two points had a monopoly over the said ferry services. The plaintiff alleged that the defendant being a monopoly owed a duty to serve all and a duty to provide the ferry services at reasonable charges. The plaintiff alleged that the defendant had arbitrarily increased the charges for the use of the ferry and refused to sell the ferry tickets or refused to provide the ferry services to the plaintiff or his employees because he complained about the defendant's conduct and had abused its monopolistic position which had caused loss and damages to the plaintiff.

[25] These proposed amendments arose from the same facts which were previously pleaded ie, that the defendant at the material times was the only and sole ferry provider between the two points. The defendant submitted that the plaintiff should have included these allegations in the pleadings or amended the pleadings earlier because these were apparent. For these reasons, the defendant is not taken by surprise and there is no prejudice caused to the defendant. Further, the defendant did not plead limitation in its defence. This application is made *bona fide*.

[26] The new para. 3 in the proposed amended statement of claim pleads a point of law in respect of a monopoly. Even if this paragraph is not pleaded, parties can still submit on a point of law on a monopoly based on the existing facts pleaded and no prejudices will be caused to the defendant.

[27] In para. 6 of the proposed statement of claim, the plaintiff for the first time alleged that the plaintiff was also appointed transporter for Sabah Flour & Feedmills Sdn Bhd at the material time. This was never pleaded or raised previously. In the first application under O. 33 r. 5, the plaintiff in his affidavit in opposition to the application affirmed that he was appointed as transporter of Gold Coin and never said that he was appointed as transporter

of Sabah Flour & Feedmills. This new allegation is not *bona fide* and should not be allowed. Similarly the last sentence in para. 12 of the proposed statement of claim is not allowed.

[28] In para. 8, the plaintiff refers to ticket fares of RM205, RM270, RM450 and RM550. The defendant submitted that these were raised for the first time. These ticket fares have been pleaded in Suit 22-15/6-2013. There was no objection and there was no application to strike out these fares in that suit. Parties have indicated that both suits be jointly tried because of similar facts and issues in order to save time and costs. Therefore no prejudice will be caused to the defendant by these ticket fares referred to which the defendant has notice of and not taken by surprise.

[29] In respect of the damages, it is for the plaintiff to prove that he is entitled to general, special and aggravated damages and the quantum thereof. These are subject to cross-examinations and proof.

[30] Therefore, the proposed amendments, except where they are not allowed as I have stated above, should be allowed as they enable the real questions in controversy between the parties to be determined at the trial.

[31] The application to amend is allowed, subject para. 30 above and to the plaintiff putting in the proper amendments underlined in red ink in accordance to the draft annexed to the application to be filed and served on the defendant within 14 days and the defendant to file and serve an amended defence if any within 14 days from receipt of the amended statement of claim. The plaintiff is to pay costs of RM1,000 to the defendant.